Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

To: The Commission

COMMENTS ON THIRD NOTICE OF PROPOSED RULEMAKING

Duncan, Weinberg, Miller & Pembroke, P.C. and Snavely, King & Associates, Inc. (hereafter counsel for "Municipal Franchising Authorities" or "MFA") herewith submit comments in the above-captioned proceeding. MFA participated in earlier phases of this proceeding, and they herewith submit Comments on Issue 3 of the Third Notice of Proposed Rulemaking: whether the Commission should permit cable operators to elect either the benchmark or cost-of-service approach for different tiers of regulated service after the initial period of rate regulation.

1. The Commission solicited comments on what procedural requirements should be adopted to provide coordination between local franchising authorities and the Commission if limitations were adopted on an operator's ability to select different

rate setting approaches for different tiers of service. The Commission also solicited comment on whether such provisions would be consistent with the local and federal regulation of cable service rates envisioned in the Cable Act of 1992.

2. In paragraph 152 of the Third Notice of Proposed Rulemaking ("3rd NPRM") the Commission is requesting an examination of whether a given cable operator may, at its pleasure, elect a dual regulatory system of maintaining the benchmark in one venue and filing cost-of-service based rates in another. This self-selected dual regulatory system brings into focus many of the issues that the MFA have previously addressed regarding the dangers of a mixed regulatory system.

3. Fortunately, in its 3rd NPRM, at Paragraph 150, the Commission tentatively concludes that "operators should be required to use the same rate-setting approach to justify the reasonableness of all regulated services."

4. The MFA support the Commission's tentative conclusion. Cable operators should be required to adhere to one regulatory scheme at a time for four basic reasons: (1) it will prevent, or at

least inhibit, the "gaming"[1/] of the system by cable operators; (2) it may reduce the number of nonessential filings; (3) it will not impose an undue burden on the cable companies and may aid in keeping down the price of cable service, and (4) it is consistent with the Commission's "tier neutral" approach to rate regulation.

Prevent Gaming of the System

5. There are two foremost ways to game a regulatory system with dual jurisdictions and dual cost standards: manipulation of venue and manipulation of cost structure. In the first case, manipulation of venue, the company can overwhelm the regulatory authority perceived to have the least resources with the most expensive and complex form of regulation. For example, given the choice, a cable operator might file with the F.C.C., which has been charged with regulating rates for thousands of operators nationwide, a complicated and expensive cost-of-service showing, while filing benchmark rates with the local franchising authority, which has been charged with regulating only a few local operators.

6. In the second case, manipulation of cost structure (see Para. 149 of the 3rd NPRM), a company

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1/ Gaming the System is a process of using regulations to gain advantage in a way that was unforeseen by the persons establishing the regulations.

can simply lump its more expensive cost elements into the tier that it chooses to have cost-based and its less expensive elements into the tier it chooses to have benchmarked.

7. Each of the two ways of gaming the system would increase the price of cable television services and increase the profits to cable operators, without any corresponding benefits to consumers. [2/] Together, the cost of cable service would rise even higher. There is nothing in the recent performance of the cable operators to indicate that they would forego any opportunity to increase their profitability, and it would be rational for them to attempt to do so if given the chance. Therefore, if the Commission leaves open a window of opportunity, then the MFA anticipate that the cable companies will quickly scurry to take advantage of it, with no offsetting advantage to cable consumers or cable rate regulators.

Reduce Non-essential Filings

8. Having to justify the whole set of their costs of service, rather than a self-selected portion thereof, should reduce the number of actual filings made. This is simply a mathematical result of a reduction in the number of possibilities and the

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2/ Neither the municipality nor the consumer can make an election about rate setting methodologies. That decision lies exclusively with the cable operator.

increased costs associated with filing before the Commission and local authorities. As shown in the decision-matrix below, under a self-selected dual rate-setting system, a cable company would have a definite incentive to file cost-of-service studies in 75% of the cases listed. Under a single rate-setting regulatory system, the company would only be certain to file in 25% of the cases listed, and only file in the additional 50% of cases if overwhelmingly justified, presumably for legitimate business reasons.

Tier 1 Condition	Tier 2 Condition	Action Dual System	Action Single System
Above Cost	Below Cost	File in Tier 1	Uncertain
Below Cost	Above Cost	File in Tier 2	Uncertain
Above Cost	Above Cost	File in Both	File in Both
Below Cost	Below Cost	Don't File	Don't File

9. As seen in this simple example, the limitation of the number of possible conditions justifying a cost-of-service hearing should reduce the overall number of filings. This would not, however, preclude the companies from filing when there was a true business need for seeking regulatory negation of the benchmark rates. It would, however, reduce the probability that a company would seek regulatory relief

when it had costs slightly above benchmark in one tier and well below in another.

Keep Down the Price of Cable Service

10. By reducing the possibility of gaming the system and reducing the likelihood of spurious cost-of-service filings, the Commission will be acting to hold down the price of cable television services to the end-user. There is an economic cost associated with the manipulations that cable companies would undergo to game the system -- costs associated with switching channels among tiers, reprinting program guides and paying accountants to shift the cost burdens of overhead. There is also an economic cost associated with simply increasing the number of filings. These costs will ultimately find their way into the actual rates consumers pay for their service or the hidden costs the consumers pay for local cable regulation. The MFA believe that these costs should be minimized by reducing the possibility of regulatory manipulation by the cable companies through self selection of their regulatory venue and structure.

Maintain Tier Neutrality

11. In adopting the benchmark/price cap methodology, the Commission emphasized repeatedly that, under this system, there would be no incentive for a cable operator to shift channels from one tier to

another. However, to the extent the Commission were to permit the cable operator to elect the rate-setting methodology depending on the rate review forum, then tier-neutrality is threatened. There is already an incentive for a sophisticated cable operator to switch from tier services to pay-per-channel services, to avoid rate regulation entirely. It does not seem desirable to encourage cable operator to package program tiers to take full advantage of the regulatory variables.

Procedural Requirements

12. The Commission asked about procedural requirements to provide for coordination between the Commission and local franchising authorities. In the cost-of-service environment particularly, there is clearly a potential for cost-savings if information is shared between the federal and local levels of government. There is no need to duplicate work already performed. Moreover, it is not yet clear to what extent the legal principle of res judicata will be applied in rate review proceedings between the local and federal levels of review, necessitating sharing of information. Such sharing of information may help insure consistency in data and decision-making and may help highlight irregularities or inconsistencies. Even in benchmark proceedings, given the ability to pass

along external costs, the sharing of information between the two levels of government could similarly be helpful. Finally, the F.C.C. has been charged by Congress with an information gathering and supervisory role to monitor the implementation of the Cable Act, and for that reason the Commission may be obligated to collect data from the local franchising authorities.

13. Accordingly, it would seem appropriate, to facilitate information gathering, to adopt reasonable procedural requirements to this end. However, the full cost of cable regulation is not yet known, and it is desirable to keep those costs down as low as possible and to realize cost savings and efficiencies wherever possible. Accordingly, the Commission might adopt appropriate rules, for example, which name the local franchising authority as a party to any F.C.C. proceeding, initiated by the filing of FCC Form 329; require the cable operator to maintain a public file in its local community of the entire F.C.C. rate proceeding; or require service of cost-of-service documentation on designated local authorities.

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Respectfully submitted,

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